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VIA ELECTRONIC FILING

Cynthia T. Brown
Chief, Section of Administration
Office of Procedures
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: ***STB Ex Parte No. 707***

Dear Ms. Brown:

Attached for electronic filing in the above-referenced docket are the Opening Comments of Norfolk Southern Railway Company in response to the Board's Notice served December 6, 2010 in this docket.

Thank you for your assistance.

Sincerely,

David L. Meyer

Attachment

cc (with attachment): John M. Scheib, Esq.
Greg E. Summy, Esq.

dc-631223

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 707

DEMURRAGE LIABILITY

OPENING COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY

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Dated: March 7, 2011

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BEFORE THE
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EX PARTE NO. 707

DEMURRAGE LIABILITY

OPENING COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY

Norfolk Southern Railway Company ("NS") submits these Opening Comments in response to the Board's Notice served December 6, 2010. In the body of these Opening Comments, NS presents its position on the general issues raised in the Board's Notice, and the Board action that would be appropriate to address those issues. We respond to the Board's specific questions in the Appendix. The factual content of these Opening Comments and the Appendix are verified by Damon M. Deese, NS's Manager of Revenue Accounting Customer Services.

INTRODUCTION AND SUMMARY OF POSITION

NS appreciates the Board's interest in addressing the obstacles carriers face when they seek to collect demurrage charges for railcars delivered to warehousemen and other middlemen (to which we refer for simplicity as "intermediaries"). The Board's Notice correctly notes many of the potential complexities associated with demurrage in these circumstances.

NS submits, however, that the issues boil down to a fairly simple core principle: all parties to which railcars are delivered for loading or unloading – regardless of their

formal legal status vis-à-vis the bill of lading – should be responsible for paying appropriate demurrage charges for delays attributable to their handling of the cars. Railroads therefore should be able to recover such charges from intermediaries that receive railcars and thereby take control of the physical handling of those cars. In instances where intermediaries are nonetheless able to escape liability for demurrage in the courts, the shippers who instructed the railroad to deliver cars to the recalcitrant receivers should be responsible for payment of such charges.

Congress has given railroads the statutory responsibility to establish and collect "demurrage charges" so as to advance the "national needs" relating to both "an adequate supply of freight cars" and "the efficient use and distribution" of those cars. 49 U.S.C. § 10746. In furtherance of these goals, NS has established demurrage charges that are designed to provide appropriate incentives for the efficient use of freight cars by parties (typically shippers and receivers) that are given custody of railcars for loading or unloading. In order to function properly, demurrage-based incentives must apply to *all parties* whose conduct with respect to the physical handling of railcars might undermine the "efficient use and distribution" of those cars. The "national needs" that motivated Congress to mandate the collection of demurrage are not served if parties who bear responsibility for the inefficient handling of freight cars can escape responsibility for demurrage charges based on arguments – such as those advanced against NS in *Groves*[1] – about their legal status vis-à-vis the bill of lading.

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[1] *Norfolk Southern Ry. Co. v. Groves*, 586 F.3d 1273 (11th Cir. 2009), *cert. denied* ___ U.S. ___, 131 S. Ct. 993 (2011).

As the *Groves* case illustrates, deliveries of railcars to intermediaries can fall into an important gap in the demurrage system. NS was instructed by the shippers in that case to deliver loaded railcars to a designated intermediary (Savannah Re-Load). That receiver was at times listed on the bill of lading as the "consignee," at times as the "care of" party, and at times in other ways. But in no case did NS have any actual knowledge of the legal relationships – if any – between Savannah Re-Load and the shipper, or between Savannah Re-Load and the freight itself, because NS was not a party to any of those arrangements. What NS did know was that Savannah Re-Load's conduct caused delays for which demurrage was properly assessed under NS's demurrage tariff. Nonetheless, as the Board is aware, NS was unable to collect demurrage charges from Savannah Re-Load.

NS's Opening Comments herein will demonstrate that the receiver's responsibility to pay reasonable demurrage charges attributable to its conduct should not turn on its legal status with respect to the bill of lading or the beneficial ownership of the freight. The onus should not be on the rail carrier to attempt to untangle the potentially complicated legal relationships among shippers, receivers, forwarders and other third parties – all of which are established by agreements to which the railroad is not a party – in order to fulfill its obligation to collect demurrage for the efficiency of the network. Railroads should not be caught in the middle when these parties point the finger at one another and ultimately leave the railroad unable as a practical matter to collect demurrage from anyone.

Congress's goals for demurrage are blind to such legal complexities, and instead call for the creation and application of incentives for the efficient use of and investment

in freight cars. As a result, all that should matter for purposes of demurrage liability is the intermediary's role in connection with the *physical handling* of the railcar.

Although the body of law that has grown up around the collection of demurrage charges has often treated the bill of lading as a determinative document, a party's status with respect to that document is not – and there is no reason it should be – the sole basis for imposing legal responsibility for demurrage on a receiver of railcars. The case law establishes that liability for demurrage may also be based on a contractual relationship between the railroad and the receiver arising *outside* the bill of lading, or on industry custom establishing such responsibility. The Board has an opportunity in this proceeding to re-align demurrage liability with Congress's goals by opening the door to the establishment of an alternative contractual basis for liability and making clear what industry custom is and should be.[2]

NS believes the Board can make meaningful progress toward a regime in which demurrage charges can effectively be enforced against intermediaries responsible for inefficient car utilization. NS therefore requests that the Board issue a policy statement expressing two key principles:

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[2] The Board's responsibility to establish effective demurrage principles is underscored by the fact that the United States, represented in part by the Board's counsel, successfully urged the Supreme Court to deny certiorari in *Groves* on the ground that the Board would be establishing in this proceeding "a default rule (or rules), in the first instance, for demurrage liability," including through the "reexamination of old regulatory precedent." *Groves*, No. 09-1212, Brief of the United States as Amicus Curiae (U.S. filed Dec. 2010), pp. 12-13, 17.

First, that proper implementation of ICCTA and the national rail transportation policy demands that intermediaries be subject to reasonable demurrage charges when their conduct results in inefficient car utilization.

Such a statement would place those intermediaries on notice that their acceptance of a freight car for placement carries with it responsibility for reasonable demurrage charges in accord with the delivering carrier's applicable (and available) tariffs. Such a statement would assist railroads in establishing in court the receiver's *contractual* liability for demurrage charges outside of the bill of lading, including liability based on industry custom. Equally important, such a statement would also confirm the *reasonableness* of efforts by carriers to hold intermediaries responsible for demurrage charges, regardless of their designation on the bill of lading or their legal relationship with the shipper or the freight. Such a statement would also preclude parties from inappropriately invoking an "unreasonable practice" assertion as a barrier to collection.

Second, that* consignors *bear responsibility for demurrage attributable to the conduct of the receivers to which they instruct carriers to deliver railcars.

Such a statement would facilitate carriers' efforts to have recourse to those shippers in circumstances where the carriers are unable to collect reasonable demurrage charges from the intermediary directly. Such a statement would also encourage consignors – who choose where to direct their shipments and presumably have a commercial relationship with those receivers – to either provide proper incentives for those intermediaries to handle cars efficiently or select other intermediaries that behave more responsibly. Finally, it would also confirm the *reasonableness* of carrier efforts to insist that consignors accept their appropriate legal responsibility.

NS does not seek through this proceeding to attribute fault for any particular category of car delay, or to expand the circumstances under which demurrage charges

might reasonably be assessed. To the contrary, NS seeks only to fill the gap in the existing system of demurrage that Congress has instructed NS to implement. When charges are properly assessed under NS's reasonable demurrage tariff, they should be collectible. The Board should act to ensure that NS and other carriers do not face unwarranted obstacles to the collection of properly assessed demurrage charges.

I. THE BOARD HAS A CENTRAL ROLE IN ENSURING THAT THE PURPOSES OF DEMURRAGE ARE ACHIEVED

Congress has spoken with unusual specificity regarding the importance of demurrage charges to the operation of the Nation's rail system. Section 10746 commands that railroads establish (and thus collect) "demurrage charges" that advance the "national needs" relating to both "an adequate supply of freight cars" and "the efficient use and distribution" of those cars. 49 U.S.C. § 10746.

Section 10746 is not the only statutory provision that highlights Congress's acute concern with the efficient utilization of railroad freight cars. In Section 10722 of the Act, Congress has charged the Board with the responsibility to "facilitate the development" of special charges for freight cars "so as to increase the utilization of equipment," in furtherance of Congress's express goal of "encourag[ing] more efficient use of freight cars." Congress thus desires that the Board play a proactive role in ensuring that the goal of efficient car utilization is met.

Both the statute itself and longstanding Board precedent emphasize the efficiency-related goals of demurrage. "[D]emurrage charges serve two purposes: (1) to compensate the railroad for added costs (*e.g.*, for the car-hire charges it pays to the carrier owning the equipment being held) or loss of the use of assets; and (2) to encourage

shippers to return freight cars to the system, thereby making the entire system more efficient."[3] This formulation is the modern version of Justice Brandeis' classic statement that "[a]ll demurrage charges have a double purpose. One is to secure compensation for the car and the track it occupies. The other is to promote efficiency by providing a deterrent against detention."[4]

Both purposes of demurrage are of vital importance to the efficiency of the rail network as a whole. As the Board's predecessor held long ago, "[t]he necessity for demurrage is well recognized. Such charges serve the best interests of the railroads, the users of rail transportation, and the public in the maintenance of an adequate transportation service."[5] As a result, the Board and its predecessor have also long recognized the important role the agency plays in enabling the collection of demurrage charges. In the mid-1970s, for example, the ICC explored revisions to its regulations aimed at ensuring that demurrage charges were collected from the responsible parties. As the ICC explained, "we cannot ignore the fact that if carriers habitually fail to assess or collect demurrage charges or detention fees, an important economic incentive for shippers and consignees promptly to release cars is destroyed."[6]

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[3] *North America Freight Car Association, v. BNSF Ry.*, STB Docket No. 42060 (Sub-No. 1) (served Jan. 26, 2007).

[4] *Turner Lumber Co. v. C. M. & St. P. Ry.*, 271 U.S. 259, 262 (1926) (Brandeis, J.); *see also ICC v. Oregon Pacific Industries, Inc.*, 420 U.S. 184, 187 (1975) (demurrage charges operate as a "deterrent against undue detention of cars"); *South Carolina Rys. Comm. v. Seaboard Coast L. R.*, 365 I.C.C. 274, 277 (1981) (quoting *Turner* with approval); *Commerce & Indust. Ass'n. of N.Y., Inc. v. B. & O. R. Co.*, 281 I.C.C. 655, 659 (1951) (demurrage charges are "designed to compensate the carriers for the shippers' use of cars for storage and, of equal importance as applied in rail transportation, are an incentive to compel release of carrier equipment"); *Louis Dreyfus Corp. v. Western Maryland Ry. Co.*, 365 I.C.C. 1, 5 (1977).

[5] *Commerce & Indust. Ass'n. of N.Y.*, 281 I.C.C. at 659.

[6] *Maintenance of Records Pertaining to Demurrage*, 352 I.C.C. 739, 746 (1976).

Any Board action in this arena, of course, should be mindful of the function of the judicial system in adjudicating demurrage claims. Although the Board plays an important, indeed the primary, role in determining when demurrage charges are appropriately assessed,[7] suits to collect unpaid demurrage liabilities must be pursued in the courts. Courts have emphasized in such cases that "there must be some legal foundation for such liability outside the mere fact of handling the goods shipped."[8] The Board must work within this legal framework when it sets policy relating to the collection of demurrage from intermediaries. As NS explains, however, there is much the Board can do to assist railroads in collecting from intermediaries reasonably-assessed demurrage charges that serve Congress's efficiency goals.

II. INTERMEDIARIES AFFECT THE EFFICIENCY OF FREIGHT CAR USAGE, BUT OFTEN FALL WITHIN A GAP IN THE DEMURRAGE SYSTEM

This proceeding addresses the role of warehousemen and other intermediaries. No less than other kinds of shippers and receivers that load and unload railcars, the conduct of such intermediaries in accepting railcars for placement, unloading those railcars, and returning the cars "to the system" has a significant effect on the efficiency of railcar use and distribution. Those intermediaries should therefore be subject to reasonable demurrage charges that provide incentives for them to act efficiently. Nevertheless, under the existing regime these intermediaries can fall into a gap in the demurrage system that must be filled if Congress's objectives are to be achieved.

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[7] *See, e.g., Chicago, R. I. & P. R. Co. v. Furniture Forwarders of St. Louis, Inc.*, 420 F.2d 385 (8th Cir. 1970).

[8] *Groves*, 586 F.3d at 1278 (quoting *Middle Atlantic Conference v. United States*, 353 F. Supp. 1109, 1118 (D.D.C. 1972) (three-judge panel) ("*Middle Atlantic*")).

A. Intermediaries Play a Crucial Role in Efficient Car Utilization

Most rail shipments are directed to receivers that have an ownership interest in the freight being shipped. Under longstanding legal precedent,[9] those receivers are responsible for demurrage charges, if any, that accrue at destination. However, an appreciable number of rail shipments are directed to warehousemen, transload facilities, and other intermediaries, who often have no ownership interest in the freight. Shipments via intermediaries are particularly common in industries where goods are moved by rail to intermediaries that arrange to hold the goods pending their transshipment via vessel for export, as well as to warehouses and distribution facilities where shipments are transloaded into trailers for movement by truck.

Intermediaries receiving rail shipments play a key role in the handling of freight cars at destination. Once a railcar containing such a shipment arrives at the railroad terminal serving the receiver's facility, the intermediary – and not the shipper or the beneficial owner of the freight – is the only party with direct control over how efficiently that freight car is handled. The intermediary's conduct, its staffing and resource allocations, and its investment decisions all can affect whether inbound cars suffer delays before being placed on the receiver's unloading tracks (for example, because the receiver's tracks are full of other cars, or simply inadequate to handle inbound volumes); whether cars placed on the receiver's tracks suffer delays in being unloaded (for example, because the receiver devotes insufficient manpower to the unloading process, or perhaps chooses to use the car as an alternative storage location pending transshipment of the

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[9] *See, e.g., In re Tidewater Coal Exchange*, 292 F. 225, 234 (S.D.N.Y. 1923) (L. Hand, J.).

freight); and whether cars rendered empty are returned promptly to the carrier or instead used by the intermediary for other purposes.[10]

The carrier has very limited ability to affect these decisions except through incentives created by the demurrage system. The carrier typically does not know why the receiver's tracks are full, or why it otherwise is unable to accept a railcar that the carrier makes available for delivery. The carrier typically does not know why the receiver still has possession of a railcar that was previously placed for unloading, and certainly cannot go onto the receiver's property to unload it. And the carrier typically does not even know when the car has been unloaded – or if it has, how it is being used – unless the receiver has sent instructions to pick up the empty car (which stops the demurrage clock). Underscoring the role played by intermediaries in efficient car handling, the Board has routinely upheld the reasonableness of carriers' demurrage charges assessed against intermediaries for delays at destination.[11]

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[10] NS wants to be clear that it is not suggesting that all delays at destination are attributable to the conduct of intermediaries (or other receivers). Such delays can also result from the carrier's conduct, such as when it fails to remove released cars from an intermediary's siding in a timely manner and thus prevents the placement of additional loaded cars. We are not in this proceeding suggesting that the Board make any finding assessing fault for any particular set of operational practices. Rather, we are asking only that the Board assist NS and other carriers in *collecting* demurrage charges when they are reasonably imposed for delays attributable to the conduct of intermediary receivers.

[11] *Springfield Terminal Ry. – Petition for Declaratory Order*, STB Docket No. 42108 (served June 16, 2010); *Capitol Materials Inc. – Petition for Declaratory Order – Certain Rates & Practices of Norfolk Southern Ry.*, STB Docket No. 42068 (served Apr. 12, 2004); *R. Franklin Unger, Trustee of the Indiana Hi-Rail Corp., Debtor – Petition for Declaratory Order – Assessment & Collection of Demurrage & Switching Charges*, STB Docket No. 42030 (served June 14, 2000); *South-Tec Dev. Warehouse, Inc., & R.R. Donnelley & Sons Co. – Petition for Declaratory Order – Illinois Cent. R.R.*, STB Docket No. 42050 (served Nov. 15, 2000); *Ametek, Inc. – Petition for Declaratory Order*, ICC Docket No. 40663 (served Jan. 29, 1993), *aff'd, Union Pacific R.R. v. Ametek, Inc.*, 104 F.3d 558 (3d Cir. 1997).

In many cases, intermediaries will have their own business imperatives that will lead them to cycle railcars through their facilities promptly. But, as noted above, in many cases their incentives may run the other way. For example, intermediaries may have incentives to store materials in railcars rather than investing in additional warehouse space; they may decline to hire sufficient personnel to unload cars expeditiously; or they may under-invest in additional siding space that could accommodate the prompt delivery and unloading of railcars in the volumes being directed to the intermediary by shippers. The only way a carrier can assure that the intermediary has incentives that correspond to the "national needs" for efficient car usage is by assessing and collecting demurrage charges.

The intermediary's legal relationships, if any, with the shipper, carrier, or owner of the freight – and the intermediary's ownership interest in the freight itself – are irrelevant to the efficiency-based role of demurrage. Demurrage seeks to compensate railroads for the use of the *railcar*, and to encourage rapid return of the *railcar* to the network. Once a carrier has delivered a railcar to an intermediary – and even before that when the receiver is notified that the railcar is available for delivery – the intermediary is the party who has control over the efficient handling of the railcar. That role does not change based on its legal relationship to the freight. To achieve Congress's goals for the system of demurrage that carriers are required to implement, such charges should be assessed against all those who are responsible for "return[ing] freight cars to the system."[12] Intermediaries should not be exempt.

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[12] *North America Freight Car Association, v. BNSF Ry.*, STB Docket No. 42060 (Sub-No. 1) (served Jan. 26, 2007).

Moreover, it would be inefficient to place the burden on the railroad to divine the legal relationships among the shipper, receiver and other third parties in order to collect demurrage. NS's processes are set up first and foremost to move cars from origin to destination promptly and to deliver them to the receivers designated by the shipper.[13] Because of this focus on efficient operations, NS often finds itself caught in the middle when demurrage is incurred by intermediaries. It is bound by law to follow shipper instructions to deliver cars to receivers, but lacks any real knowledge of the legal status of that intermediary. If that intermediary uses cars inefficiently, NS often does not know where to turn to collect demurrage, and its collection efforts thus can be unsuccessful. Consequently, NS's demurrage system is often is unable to achieve its pro-efficiency goals. In light of Congress's command that NS establish a system of demurrage charges that serve the nation's "needs" for efficient car usage and investment, this is an unacceptable outcome.

B. Several Obstacles Can Prevent Effective Collection of Demurrage When Railcars Are Delivered to Intermediaries

Although the *purposes* of demurrage plainly apply in full to intermediaries whose conduct affects the efficient use of railcars, railroads face obstacles when they seek to collect demurrage charges from intermediaries in court. Intermediaries often resist payment of such charges, sometimes by arguing that, even if their conduct caused delays for which demurrage was properly assessed, they bear no legal responsibly to the railroad

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[13] Were NS's processes instead aimed at sorting out the receiver's legal status vis-à-vis the shipment, so as to facilitate collection of demurrage, those processes could cause additional delays that would defeat the very purpose of the demurrage charges in motivating efficient car usage.

for those charges and cannot be forced to pay.[14] This position draws strength from legal precedent establishing that the intermediary's mere handling of the car does not, by itself, give rise to any legal basis for assessing demurrage charges. As the Eleventh Circuit explained in *Groves,* the weight of authority establishes that "there must be some legal foundation for such liability outside the mere fact of handling the goods shipped," which must in turn "be founded either on contract, statute or prevailing custom."[15] In looking for such a "legal foundation" that case law has tended to focus narrowly on the intermediary's status vis-à-vis the bill of lading.

Although such a focus does not preclude NS from collecting demurrage from responsible intermediaries in some cases, that focus makes collection more difficult than necessary. It thus under-compensates carriers for use of their equipment and unnecessarily interferes with the important role played by demurrage charges in providing intermediaries with incentives to handle railcars efficiently.

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[14] Intermediaries, like other receivers, also resist payment of demurrage by arguing that car delays were properly attributable to the carrier's conduct rather than their own and thus that it would be unreasonable to assess demurrage charges. Arguments of this sort can be resolved on the facts, sometimes with the help of the Board, and do not pose any systematic obstacle to the collection of demurrage from intermediaries. *See, e.g., R. Franklin Unger, Trustee of the Indiana Hi-Rail Corp., Debtor – Petition for Declaratory Order – Assessment & Collection of Demurrage & Switching Charges*, STB Docket No. 42030 (served June 14, 2000) at 9-10 & n.22 (finding demurrage appropriate, but remitting to bankruptcy court to determine fault in specific instances); *Capitol Materials Inc. – Petition for Declaratory Order – Certain Rates & Practices of Norfolk Southern Ry.*, STB Docket No. 42068 (served Apr. 12, 2004) (finding certain carrier practices not unreasonable, and remitting case to trial court for determinations regarding specific factual allegations).

[15] *Groves*, 586 F.3d at 1278 (quoting *Middle Atlantic*, 353 F. Supp. at 1118); *see also Evans Prods. v. ICC*, 729 F.2d 1107, 1113 (7th Cir. 1984) (liability "may be imposed only against consignor, consignee, or owner of the property, or others by statute, contract, or prevailing custom"); *Southern Pacific Transp. Co. v. Matson Navigation Co.*, 383 F. Supp. 154, 156 (N.D. Cal. 1974) ("obligation to pay demurrage arises either out of contract, statute or prevailing custom").

The judicial and Board precedents reviewed in the Board's Notice, as well as NS's own experience in *Groves*, highlight the kinds of obstacles railroads face when asserting demurrage claims against intermediaries.

1. The *Groves* Ruling Calls into Question the Ability of Carriers to Rely Upon the Bill of Lading in Seeking Collection of Demurrage from Intermediaries Designated as "Consignees"

Traditionally, the clearest path for establishing an intermediary's legal responsibility to pay demurrage charges attributable to its conduct has been the "contract of transportation" itself, as embodied in the bill of lading.[16] A long line of precedent correctly establishes that one unquestionably valid basis for holding intermediaries liable for demurrage charges is their designation in the bill of lading as the "consignee." This is the rule articulated most recently by the Third Circuit in *Novolog*.[17] In reliance on this principle, when seeking to collect unpaid demurrage charges from intermediaries NS has routinely based its claims on the bill of lading, rather than seeking to establish some other basis for the intermediary's liability.

The *Groves* decision, however, calls into question NS's ability to rely on the bill of lading. The Eleventh Circuit held that it is not enough that the bill of lading identifies the intermediary as the "consignee" – as Savannah Re-Load was designated on many of the bills of lading at issue in *Groves*. Instead, *Groves* suggests that the railroad must establish through some other means that the intermediary "assent[ed] to being named as

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[16] As the Supreme Court has explained, the bill of lading is the "basic transportation contract between the shipper-consignor and the carrier; its terms and conditions bind the shipper and all connecting carriers." *Southern Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 342 (1982).

[17] *CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247, 257 (3d Cir. 2007), *cert. denied*, 552 U.S. 1183 (2008).

consignee" or "at least [was] given notice that it is being named as a consignee in order that it might object or act accordingly."[18] Given the importance the *Groves* court appears to attach to the existence of a "meeting of the minds between the parties,"[19] there is uncertainty whether an intermediary who is aware of its designation could still escape liability merely by asserting that it *did not agree* to become a "consignee" and thereby assume liability for demurrage. *Groves* also suggests that NS might be required in such cases to offer proof that the intermediary was in fact the true "consignee," not someone merely misidentified as such on the bill of lading.[20] This could erect a considerable hurdle to collection given that, absent discovery against the intermediary in a legal proceeding,[21] the only basis for the railroad's knowledge regarding the intermediary's role and legal relationships typically is the bill of lading itself. The *Groves* rule – however interpreted and applied – undermines the national need for demurrage because it gives the party who has actual control of the railcar a potential avenue for avoiding demurrage by claiming ignorance or lack of assent.

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[18] 586 F.3d at 1282.

[19] Id. at 1281.

[20] Further complicating the potential issues created by *Groves* are arguments by intermediaries to the effect that they cannot be true "consignees" unless they have a beneficial ownership interest in the freight. These arguments draw force from the historic role played by the bill of lading as a receipt for the freight itself. One step the Board could take to help reduce the burdens carriers face in collecting demurrage would be to clarify that in the modern transportation world a "consignee" is the designated receiver of the freight regardless of its ownership interest in that freight.

[21] The *Groves* court alludes to the potential for proving consignee status using "interrogatories or deposition testimony." *Id.*

2. Board and Judicial Precedent Unnecessarily Discourage the Collection of Demurrage from Intermediaries that Are Not Listed on the Bill of Lading as "Consignees"

Second, although the cases make clear that liability for demurrage may be "founded either on contract, statute or prevailing custom,"[22] the body of judicial and Board precedent that has grown up around demurrage tends to discourage efforts to impose liability against intermediaries except when they are designated on the bill of lading as the consignee. In *Groves*, for example, this body of precedent led NS to withdraw its claims against Savannah Re-Load for demurrage charges associated with a large number of cars for which Savannah Re-Load was designated on the bill of lading as the "care of" party, notwithstanding that Savannah Re-Load's use of those cars was just as inefficient as for those where Savannah Re-Load was designated as the "consignee."

The leading precedent in this area is the ICC's decision in *Eastern Central States*,[23] which was affirmed by a three-judge panel in *Middle Atlantic Conference v. United States*.[24] In *Eastern Central States*, the ICC held unlawful motor carrier tariffs that purported to impose liability for "detention" charges (the motor carrier equivalent of demurrage) on all "parties causing the delay," including "person[s] not a party to the contract of transportation."[25] *Middle Atlantic* upheld the ICC's orders, and its discussion of pertinent legal principles gave rise to a line of cases suggesting that intermediaries

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22 *Middle Atlantic*, 353 F. Supp. at 1118.

23 *Responsibility for Payment of Detention Charges, Eastern Central States*, 335 I.C.C. 537 (1968).

24 353 F. Supp. 1109 (D.D.C. 1972).

25 *Eastern Central States*, 365 I.C.C. at 542.

generally may not be held liable for demurrage unless they are "named in the bills of lading as consignors or consignees of shipments."[26]

Although the ruling in *Middle Atlantic* is not nearly as categorical as some of the language of subsequent decisions suggests, these cases do create a strong *perception* that only consignees may be held liable. This in turn establishes a significant barrier to efforts by railroads to collect demurrage from intermediaries.

In cases where the intermediary "in care of" a named consignee, or when the consignee invokes 49 U.S.C. § 10743 by asserting its agency status and identifying the "beneficial owner" of the freight,[27] it may seem natural to seek to collect demurrage from the consignee or an identified "beneficial owner." However, NS typically has no relationship whatsoever with these entities when it delivers shipments to an intermediary. Those entities typically are the receivers of goods *after* they have been unloaded from railcars and transshipped via other transportation modes to destinations, often overseas, that are not rail-served. In *Groves*, for example, the rail shipments NS delivered to Savannah Re-Load's facility typically were unloaded there and subsequently placed on oceangoing vessels bound for overseas ports of call. When Savannah Re-Load was a "care of" party, the consignees often were foreign firms (located in such distant lands as Jeddah, Saudi Arabia) whose only contractual relationships were presumably with the shipper, or perhaps with Savannah Re-Load, but certainly not directly with NS.

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[26] *See Middle Atlantic*, 353 F. Supp. at 1122; *see also, e.g., Groves*, 586 F.3d at 1278-79 ("only an original party to the rail transportation contract, or a consignee by virtue of acceptance of the goods, may be liable for demurrage"); *Illinois Central R.R. v. South Tec Development Warehouse, Inc.*, 337 F.3d 813, 820 (7th Cir. 2003) ("whether South Tec was the consignee is properly the central issue here").

[27] We discuss the application of Section 10743 in the Appendix, at pages 35-39, below.

Attempting to collect demurrage charges incurred by an intermediary from an overseas firm with which NS has no direct relationship would require extraordinary effort and cost – probably far outweighing the amount of the charges due – and might not be possible as a practical or legal matter.

In these situations, it may be more feasible for NS to seek to collect demurrage charges from the shipper/consignor, but NS has traditionally been hesitant to seek collection from that party. As the Board's Notice herein notes, demurrage has traditionally been collected from the shipper for delays at origin and *the receiver* for delays at destination. NS thus has been reluctant to demand that shippers also take responsibility for delays at destination, even though they are the entities who instructed NS to deliver railcars to those destinations.

Moreover, NS's attempts to collect demurrage charges that are attributable to the conduct of intermediaries would be made even more complicated if intermediaries are permitted to maintain the position that they have no legal relationship with either the shippers or consignee. In *Groves*, for example, Savannah Re-Load sought to avoid responsibility by arguing not only that it had no contractual relationship with NS, but also that it was not acting on behalf of either the shipper or the consignee. As Savannah Re-Load contended, it "had not acted as anyone's agent" – rather, it was merely an independent contactor providing storage and transload services for shipments that happened to be consigned to its dock.[28] Shippers and consignees could seek to rely on

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[28] Brief in Support of Defendant's Motion for Partial Summary Judgment at 8, *Norfolk Southern Ry. Co. v. Brampton Enterprises, LLC*, No. 4:07-cv-00115, ECF No. 60 (S.D. Ga. filed May 30, 2008) (attached hereto as Exhibit A).

assertions of the same sort – no matter how fanciful they may be as a matter of fact[29] – to argue that it would be unreasonable to force them to pay demurrage charges incurred by *intermediaries* that acted solely on their own behalf and not as agents of the shippers or consignees. Unless such intermediaries can be held responsible directly regardless of what relationship they have with the carrier or any other party, railroad may be unable to collect demurrage from anyone in situations like this.

III. THE BOARD SHOULD ENCOURAGE THE APPLICATION OF DEMURRAGE-BASED INCENTIVES TO ALL PARTIES WHOSE CONDUCT AFFECTS THE "EFFICIENT USE AND DISTRIBUTION" OF RAILROAD FREIGHT CARS

NS believes that Board action is indispensible to meaningful progress toward a regime in which demurrage charges can effectively be enforced against intermediaries responsible for inefficient car utilization. The Board should not disrupt the well-settled basis for establishing a consignee intermediary's liability based on the bill of lading under *Novolog* and other cases, but it should assist carriers in closing the important gap that exists in the demurrage system as a result of courts' unduly narrow focus on the bill of lading as the sole basis for establishing liability.

First, the Board should issue a policy statement expressing the Board's determination that, in order to carry out the rail transportation policy and Congress's goal of efficient freight car usage, intermediaries must be subject to reasonable demurrage charges whenever their conduct results in inefficient car utilization. This will place those

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[29] NS believes that any such contention is preposterous, since shipments realistically would not be directed to the intermediary's facility for unloading without there being in place some understanding regarding the intermediary's legal responsibilities to the shipper or owner of the freight, but of course proving the existence and nature of such a relationship is a burden that railroads should not have to bear in order to collect demurrage.

intermediaries on notice that their receipt of freight cars – whether loaded or empty – carries with it responsibility for reasonable demurrage charges in accord with the delivering carrier's applicable tariffs, and that industry custom demands that such receivers assume this responsibility. Such a statement would assist carriers in establishing *in court* the legal underpinnings for collecting such charges. Equally important, such a statement would also confirm the *reasonableness* of efforts by carriers to hold intermediaries responsible for demurrage charges regardless of their designation on the bill of lading or their legal relationship with the shipper or the freight. Such a statement would preclude parties from inappropriately invoking an "unreasonable practice" assertion as a barrier to collection.

Second, the Board should issue a policy statement confirming that *consignors* bear responsibility for demurrage attributable to the conduct of the receivers to which they instruct carriers to deliver railcars. Such a statement would facilitate carriers' efforts to collect reasonable demurrage charges from those shippers when they are unable to do so directly from the intermediary. Such a statement would also encourage consignors – who are the parties that choose where to direct their shipments and presumably have a commercial relationship with those receivers – to provide proper incentives for those intermediaries to handle cars efficiently so as to minimize demurrage charges, or else to select other intermediaries that behave more responsibly.

A. A Board Policy Statement Placing Intermediaries on Notice that They Are Properly Held Responsible for Reasonable Demurrage Charges Attributable to Their Conduct Regardless of their Legal Status Would Assist in the Collection of Such Charges from Intermediaries

Because demurrage claims must be brought in court, where courts will insist on a "legal foundation for . . . liability outside the mere fact of handling the goods shipped,"[30] a Board statement of policy that intermediaries must be responsible for such charges in order to carry out Congress's statutory goals would not by itself be sufficient to establish liability for demurrage on the part of intermediaries. NS believes, however, that such a statement would be quite helpful in assisting potential efforts by NS to establish a legal foundation for collection outside the bill of lading.

Despite their narrow focus on the bill of lading in most cases, courts have made clear that an intermediary's liability might be established not merely by that contractual document, but also by (a) other sources of contractual obligation or (b) prevailing custom.[31]

Groves itself emphasizes that intermediaries who are not liable under the bill of lading as consignees are nonetheless "free to contractually assume liability for demurrage charges."[32] Contract law permits the formation of a contract in a wide array of circumstances, including where a party is offered the opportunity to make use of property only if it abides by certain terms and then accepts that offer by making use of the

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30 *Middle Atlantic*, 353 F. Supp. at 1118.

31 *See generally Groves*, 586 F.3d at 1277-78; *Evans Products*, 729 F.2d at 1113.

32 *Groves*, 586 F.3d at 1278 (citing *Middle Atlantic*, 353 F. Supp. at 1122); *see also Union Pacific R.R. v. Ametek*, 104 F.3d 558 (3rd Cir. 1997) (examining whether intermediary that was not named as consignee had nonetheless entered some separate contractual arrangement making it responsible for demurrage charges).

property.[33] A Board statement of policy establishing that intermediaries must be responsible for reasonable demurrage charges, coupled with a statement that it would be reasonable for carriers like NS to insist that they accept such responsibility – and indeed that the Board would deem them to have agreed to be responsible whenever they accept and use railcars – would open the way for carriers to experiment with commercial arrangements aimed at facilitating the collection of demurrage from such intermediaries.

Likewise, a Board policy statement would establish an "industry custom" – bolstered by Congress's statutory goals – establishing the principle that intermediaries who accept freight cars are responsible for demurrage charges associated with their actions.[34]

B. A Board Policy Statement Confirming that Shippers Who Direct Cars to Intermediaries Are Responsible for Reasonable Demurrage Charges Attributable to the Conduct of Those Receivers Would Assist in the Collection of Such Charges from Shippers

NS does not expect that a Board policy statement regarding the responsibility of intermediaries would instantly change the legal landscape governing demurrage liability.

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[33] *See generally* 1-3 Corbin on Contracts § 3.8 ("There are numerous cases in which one offers to transfer ownership of chattels and authorizes the offeree to take possession on certain terms. The taking possession by the offeree is an acceptance by an act, and it is also a promise to comply with the specified terms."). For an instructive analogy, *see Ostman v. Lee*, 91 Conn. 731 (1917), in which the defendant was offered possession of an automobile on condition that he would purchase it if he found it useful. The defendant claimed that he did not find the vehicle useful, but nonetheless kept the car for two years. The court determined that a contract had been formed and accepted by the defendant. In taking possession of the car, the defendant was bound by the terms of the offer, notwithstanding his later refusal to purchase the car.

[34] Such an "industry custom" would provide a basis for a court to imply as a matter of law a commitment to pay demurrage when a party receives railcars for unloading, just as a court would imply an undertaking by any receiver to return such cars rather than keep them. *See, e.g., Baii Banking Corp. v. Atlantic Richfield Co.*, 1987 WL 14124 (S.D.N.Y.) (defendant's contractual obligation to pay for shipment ordered by plaintiff for delivery to defendant, but which defendant refused, was properly established by industry custom establishing responsibility in like circumstances).

Accordingly, it would be beneficial for the Board also to confirm that it would be reasonable for carriers to require that *shippers* also bear legal responsibility for demurrage incurred by the intermediaries to which they direct the delivery of railcars.

Such a statement would have two important effects. First, it would assist in closing the gap that currently exists in the demurrage system, whereby many of the railcars used by intermediaries are as a practical matter outside the demurrage system. If carriers were encouraged to insist that shippers remain responsible for demurrage charges in these circumstances, the shippers would have incentives to pass that responsibility down the chain to the intermediaries with which they deal.[35] Second, the potential for collection of demurrage charges from the shipper would also provide incentives for the shippers themselves to avoid taking actions that lead to inefficient car usage at destination. For example, intermediaries sometimes contend that they should not be responsible for demurrage because the volume of shipments directed to them by the shipper overwhelms their limited throughput and leads to unloading delays for which they should not be responsible.[36] By metering their shipments, or choosing more carefully which intermediaries they send shipments to, consignors might be able to help avoid such delays.

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[35] One way in which shippers might seek to do this would be to provide receivers notice that they have been designated as the "consignee" in the bill of lading and thus – even under the *Groves* ruling – would be responsible for demurrage accrued at destination.

[36] *See, e.g., Capitol Materials Inc. – Petition for Declaratory Order – Certain Rates & Practices of Norfolk Southern Ry.*, STB Docket No. 42068 (served Apr. 12, 2004), pp. 6-7.

The shipper's *legal* responsibility for demurrage charges is well established, and flows directly from the bill of lading itself. In *Southern Pacific v. Matson*,[37] for example, the court expressly noted the hardship carriers might face if unable to collect demurrage charges from intermediaries, but observed that the carrier was "in the best position to discuss the problem with its shippers and to point out their potential liability under the applicable demurrage tariffs."[38] Likewise, *Middle Atlantic* explains that the carrier may collect demurrage charges incurred by intermediaries from consignors, and "may require them to guarantee the payment of such charges when delay is caused by their agents."[39] Numerous other courts have similarly held that, as the consignor bound by the bill of lading, the shipper remains liable for demurrage under the bill of lading unless it has expressly renounced such responsibility and the carrier has nonetheless accepted the shipment.[40]

Despite the sound legal foundation for collecting demurrage from shippers, NS has traditionally been reluctant to do so with respect to delays incurred at destination, and NS suspects that shippers would resist taking on such responsibility. A statement by the Board that shippers remain responsible for demurrage incurred by their intermediaries regardless of the existence of any formal legal relationship between the shipper and the

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[37] *Southern Pacific Transp. Co. v. Matson Navigation Co.*, 383 F. Supp. 154 (N.D. Cal. 1974).

[38] *Id.* at 159.

[39] *Middle Atlantic*, 353 F. Supp. at 1126. *See also, e.g., New York Produce Exchange v. Baltimore & Ohio R.R.*, 46 I.C.C. 666, 671 (1917) (carriers may demand that shippers guarantee payment of storage charges incurred by intermediaries at port); *New York Board of Trade v. Director General, Central R.R. Co. of New Jersey*, 59 I.C.C. 205, 209 (1920) (same).

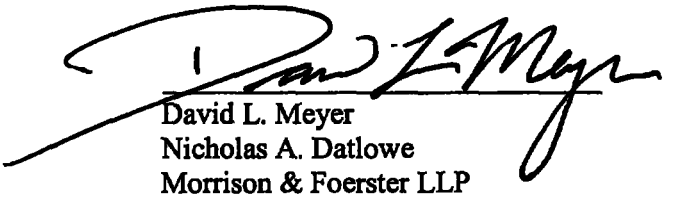
[40] *See, e.g., Novolog*, 502 F.3d at 263 (consignor is liable); *Evans*, 729 F.2d at 1112-13 (consignor is liable).

intermediary, and also that it would be reasonable for carrier to insist that shippers accept such responsibility, would be of great assistance to NS's efforts to close the demurrage gap that arises when intermediaries are involved.

CONCLUSION

NS respectfully requests that the Board assist railroads in filling the existing gap in the demurrage system so as to carry out Congress's command that the system of demurrage serve the "national needs" in efficient use of, and investment in, railcars. The Board should issue policy statements establishing that, in order to achieve Congress's goals, intermediaries must be responsible for paying reasonable demurrage charges whenever their conduct affects the physical handling of railcars, and that the consignors of shipments to such intermediaries must also remain responsible for demurrage charges accruing at the destinations to which they instruct carriers to deliver cars.

Respectfully submitted,



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APPENDIX:
RESPONSES TO SPECIFIC QUESTIONS POSED BY THE BOARD

The body of NS's Opening Comments addresses many of the specific questions posed in the Board's Notice. For the Board's convenience, we provide in this Appendix direct responses to those questions.

1. ***"Describe the circumstances under which intermediaries ought to be found liable for demurrage in light of the dual purposes of demurrage. Notwithstanding the ICC's decision in Eastern Central States, is there a reason why we should not presume that a party that accepts freight cars ought to be the one that is liable regardless of its designation on the bill of lading, so long as it has notice of its liability before it accepts cars?"***

As set forth in the body of NS's Opening Comments, NS believes that demurrage-based incentives should apply to all intermediaries whose conduct affects the efficient use of freight cars, regardless of how they are designated on the bill of lading, and regardless of their other legal relationships – to which NS is not a party and is otherwise unaware – with the consignor or other third parties.

In order for demurrage-based incentives to be effective, the Board should put intermediaries on notice of their potential liability for demurrage by issuing a policy statement in this proceeding explaining that intermediaries should not rely on *Eastern Central States* – or on court decisions like *Groves* – to conclude that they are exempt from potential application of demurrage charges. NS believes that consignors also play a key role in informing the receivers to which they direct cars for delivery that those receivers are responsible for paying any demurrage charges that are attributable to the receiver's conduct, so that they will have appropriate incentives to make efficient and responsible use of freight cars tendered to them for delivery.

The Board's question does not directly address whether courts would necessarily uphold railroad claims in the courts seeking collection of demurrage charges. As explained above, NS believes that existing case law leaves room for establishing an intermediary's legal responsibility to pay such charges without reference to the bill of lading. *See* pages 24-25, above. A Board statement establishing the principle that intermediaries should be responsible, and providing notice to intermediaries and others regarding that principle, ought to provide a sufficient basis for railroads to pursue contractual claims against intermediaries whose behavior causes inefficient car usage.

The Board, however, cannot guarantee that courts will in all cases find a sufficient basis for holding an intermediary that is not the consignee legally responsible for demurrage. Given that uncertainty, as also explained above, NS believes it is important for the Board to confirm that the *consignor* remains responsible for demurrage caused by the intermediaries to which it directs railcars for delivery. Such responsibility is consistent with applicable law and will provide the necessary incentives for consignors to both (a) take appropriate precautions regarding the identity of the receivers to which they direct freight shipments and (b) use their own influence and/or legal relationship with such receivers to provide incentives for the receiver not to incur demurrage charges.

2. ***"Explain how the paperwork attending a shipment of property by rail is processed and how it gives (or does not give) all affected parties (rail carriers, shippers, consignee-owners, warehousemen etc.) notice of the status they are assigned in the bill of lading. For purposes of assessing demurrage, should it be a requirement that electronic bills of lading accurately reflect the de facto status of each party in relation to other parties involved with the transaction? If so, and if electronic bills of lading do not accurately reflect the de facto status of each party in relation to other parties involved with the transaction, please suggest changes that will ensure that they do."***

NS's "paperwork" (and related flows of electronic information) relating to rail shipments is set up primarily to move railcars efficiently in accordance with the shipping instructions provided to NS by the shipper. The information flow for the freight shipment begins with a bill of lading prepared by the shipper (consignor), which provides the railroad with the shipper's instructions regarding the delivery of a particular shipment (and the railcar containing it) to a particular destination.[41]

In the course of delivering the railcar to the prescribed destination, NS generally does not attempt to communicate with the receiver or any other third party regarding their legal "status" under the bill of lading or otherwise, but does engage in routine and frequent communications with receivers of railcars concerning when and where the car will be delivered. Those communications are handled by NS's Central Yard Operations and cover such matters as the availability of the railcar for placement on the receiver's trackage and notification that a car has been actually or constructively placed. Both actual placement and constructive placement start the demurrage clock. These

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[41] NS responds herein to the Board's question about communications relating to the movement of *a freight shipment*. It is important to note, however, that the use of *the railcar* does not start or end with the shipment of freight that the car is used to transport. At origin, shippers who order cars need to load them promptly, and demurrage therefore can arise as a result of delays that occur before the railcar is loaded (and even when the freight car never ends up being used for a freight shipment). Likewise, demurrage can arise at destination after the freight is unloaded but before the car is returned to the carrier.

communications alert the receiver to the potential application of NS's demurrage tariff, but they are designed to facilitate the efficient movement of the railcar in accord with the shipper's instructions, not to facilitate collection of potential demurrage liabilities.

3. ***"With the repeal of the requirement that carriers file publicly available tariffs, how can a warehouseman or similar non-owner receiver best be made aware of its status vis a vis demurrage liability? Does actual placement of a freight car on the track of the shipper or receiver constitute adequate notification to a shipper, consignee or agent that a demurrage liability is being incurred? What about constructive placement (placement at an alternative point when the designated placement point is not available)?"***

NS's current demurrage tariff, along with a document explaining that tariff, is available on NS's public website and thus accessible to all entities that receive railcars from NS.[42] Accordingly, were the Board to issue a statement of policy establishing that intermediaries are responsible for reasonable demurrage associated with their handling of railcars regardless of their status vis-à-vis the bill of lading, those intermediaries would immediately have access to information regarding the circumstances under which NS might seek to collect demurrage charges from them.

In addition, as explained in response to Question No. 2 above, NS's communications with receivers regarding the delivery of railcars alerts them to the potential application of NS's demurrage tariff.

The same is true for railcars that are "constructively placed." NS applies this designation when cars designated for receipt by a particular receiver are ready for placement on that receiver's tracks, but cannot be placed there because the receiver is

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[42] *See* http://www.nscorp.com/nscorphtml/publications/NS6004-C.pdf (current demurrage tariff); http://www.nscorp.com/nscorphtml/pdf/demurrage_faq.pdf (Q&A document explaining NS's demurrage tariff).

unable to accept them (either because the tracks are full or for some other reason attributable to the receiver). In those situations, NS provides the receiver with a "notice of constructive placement" indicating that the cars are being held by NS and may be accruing demurrage charges under NS's tariff.

4. ***"Describe how agency principles ought to apply to demurrage. Are warehousemen generally agents or non-agents, or are their circumstances too varied to permit generalizations? How can a rail carrier know whether a warehouseman or similar non-owner receiver of freight is acting as an agent or in some other capacity?"***

NS seldom knows whether a particular intermediary is acting as an agent with respect to a particular freight shipment destined to the intermediary's facility, or on whose behalf that intermediary is acting. NS presumes that the legal relationships of intermediaries vary considerably, and in many cases could differ from one shipment to the next. The only time when NS has any specific knowledge of these legal relationships is when the intermediary has specifically informed NS that it is acting on behalf of an identified principal with respect to some specific activity.

As we have explained above, however, NS is not the appropriate party to attempt to unravel the commercial relationships among these third parties. The difficulties a railroad would face in unraveling these relationships are illustrated by the *Groves* case. In *Groves*, Savannah Re-Load asserted that bills of lading designating it as a "consignee" were inaccurate, not because it was merely an agent, but simply because it was not beneficial owner of any freight and had no contractual relationship with NS. Savannah Re-Load also asserted that other bills of lading listing it as a "care of" party were equally

wrong because it was acting as an independent contractor – and not as an agent for anyone – when shipments were delivered to its facility for transloading.[43]

As reflected in the body of NS's Opening Comments, NS does not believe that potential liability for demurrage should turn on an intermediary's legal relationship with other parties involved in the shipment of freight. The receiver's potential liability should instead turn on its *operational* role with respect to the efficient use of the *freight car.* All intermediaries play such a role regardless of whether they are acting as an agent with respect to a particular freight shipment.

Even when a receiver is in fact acting as an agent for the purpose of receiving a freight shipment, its role in the handling of the freight car (both before and after the freight shipment is removed from the car) is distinct, and properly gives rise to a separate operational and legal relationship *directly* with the rail carrier that delivered the car. Railroads should be able to collect demurrage from the car handling party regardless of whether that party happens to be an agent for some other purposes relating to a freight shipment.[44]

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[43] Brief in Support of Defendant's Motion for Partial Summary Judgment at 8, *Norfolk Southern Ry. Co. v. Brampton Enterprises, LLC*, No. 4:07-cv-00115, ECF (S.D. Ga. filed May 30, 2008) (Exh. A hereto).

[44] *See, e.g., Enderwood v. Sinclair Broadcast Group, Inc.*, 233 Fed. Appx. 793, 802 (10th Cir. 2007) ("if the agent acts outside the scope of the agency, he can be held liable"). *See also, Seguros Benavenez, S.A. v. S/S Oliver Drescher*, 762 F.2d 855, 860 (2d Cir. 1985) (agents may be held liable for actions outside the scope of their agency); *Ariel Maritime Group, Inc. v. Zust Bachmeier of Switzerland, Inc.* 762 F. Supp. 55, 59-60 (S.D.N.Y 1992) (same).

5. ***"Given the discussions in Hub City and Hall, should § 10743 be read as applicable to demurrage charges at all? The ICC said it was in Eastern Central States, but it did so with little discussion. Would general agency principles apply to demurrage liability even if § 10743 were found inapplicable?"***

NS responds to the Board's question in two parts: (a) does Section 10743 apply to demurrage at all? and, if so, (b) what does it mean for Section 10743 to apply to demurrage?

(a) ***Applicability of Section 10743 to Demurrage***

Courts addressing demurrage claims against intermediaries have treated Section 10743 as applicable to demurrage charges in situations where the railroad was seeking to impose liability based on the intermediary's status as the named consignee. In that context, *Novolog* expressly held that "demurrage rates are 'rates for transportation' under Section 10743."[45] Other cases have similarly treated the statute as potentially applicable to demurrage, including *South Tec*,[46] and *Groves*.[47] Even *Hub City*,[48] cited in the Board's Notice, treated the statute as applicable to equipment detention charges, which are the motor carrier equivalent of demurrage.[49]

The potential application of Section 10743 to demurrage is supported somewhat by the broad statutory definition of "transportation." Section 10743 by its terms applies to "rates for transportation for a shipment of property," and ICCTA defines

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[45] 502 F.3d at 256-57.

[46] *Illinois Central R.R. v. South Tec Development Warehouse, Inc.*, 337 F.3d 813, 817 (7th Cir. 2003)

[47] 586 F.3d at 1279.

[48] *Blanchette v. Hub City Terminals, Inc.*, 683 F.2d 1008 (7th Cir. 1981).

[49] Although the court treated the statute as applicable to detention, it nonetheless rejected Hub City's effort to avoid liability under the provision on the ground that the potential hardship addressed by the statute was not present, since "the entire bill was submitted to the consignee" and "[n]o additional amounts were later found due under the tariff." 683 F.2d at 1011.

"transportation" to include railcars and other equipment "related to the movement of ... property ... by rail" (49 U.S.C. § 10102(9)(A)), suggesting that charges related to the efficient use of railcars may be charges for "transportation."

That conclusion, however, does not definitively establish that demurrage charges are "rates" for transportation "for a shipment of property" of the sort to which Section 10743 is applicable. To the contrary, there is considerable room for debate whether Congress intended for Section 10743 to apply to demurrage at all given Congress's separate admonition (in Section 10746) that railroads should collect demurrage to serve the "national needs" for efficient freight car usage, a goal that would be undermined if receivers could use Section 10743 to pass off liability to a third party (their principal) who played no role with respect to railcar handling and who may be a foreign entity from which it would difficult – if not impossible – to collect. In addition, there is considerable precedent distinguishing between transportation rates and demurrage charges in a variety of settings.[50]

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[50] The Supreme Court, for example, has held that the purposes of demurrage charges, and the authority of the Board's predecessor with respect to such charges, extends beyond the potential characterization of those charges as part of "transportation charges" – they separately operate as a "deterrent against undue detention of cars." *Oregon Pacific Industries*, 420 U.S. at 187.

In addition, the ICC has ruled that shippers may challenge the reasonableness of demurrage charges without demonstrating the carrier's market dominance. *See, e.g., Detention Charges on Coal from Oklahoma to Missouri, via SLSF*, 362 I.C.C. 700, 708 (1980) ("Demurrage or detention charges are not rates or charges as those terms are normally understood in ratemaking. [They] relate not to rail transportation of any particular traffic or movement, and are not justified solely on the basis of increased costs. Rather, demurrage is a cost imposed upon the shipper or receiver for excessive delay in the loading or unloading of freight cars, and demurrage charges have always been considered not as carrier rates or charges but as an integral part of rules and regulations relating to the improved use and movement of cars.").

In order to give force to Congress' goal that demurrage apply to all receivers, regardless of their legal status, when their conduct results in inefficient freight car usage, the Board may not need to upset the seemingly-settled premise that Section 10743 applies to demurrage in at least certain circumstances.

(b) ***Proper Application of Section 10743 in the Demurrage Setting***

The fact that courts have regarded Section 10743 as applying to demurrage in some circumstances does not mean that the statute is a barrier to collection of demurrage from intermediaries whenever they might act as "agents" for the "beneficial owner" of freight. Even if Section 10743 does apply to demurrage and thereby allows *consignee-intermediaries* to provide notice of their agency status and so avoid the liability that would otherwise be established by their designation in the bill of lading,[51] the statute does not preclude imposing liability on the same intermediaries when based on a legal foundation *other than* the bill of lading.

By its terms Section 10743 speaks at most to the potential liability of an intermediary "named in the bill of lading as consignee" with respect to a "shipment of property," and then operates to relieve such an intermediary of liability when it identifies the "beneficial owner" of the property. This language has no proper application to the

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[51] No intermediary can ever use Section 10743 to avoid liability unless it complies with the statute's written notice requirements. To do this, the intermediary must both inform the railroad "before delivery" that it is not the beneficial owner of the property and provide the name and address of the beneficial owner. To be effective, such a notification necessarily must relate to each specific shipment for which the intermediary seeks to avoid responsibility, since the identity of the beneficial owner can vary from shipment to shipment. In addition, under the plain language of Section 10743, and as the court ruled in *Hub City*, the only charges properly avoided under Section 10743 are those that are "found to be due after delivery." The reach of the latter limitation may be subject to some debate, as reflected in *Novolog*'s discussion of *Hub City (see Novolog*, 502 F.3d at 256 n.9), but cannot be ignored.

potential legal responsibility of a railcar receiver for demurrage or other charges that rests on some foundation other than the bill of lading or their "beneficial ownership" of freight. The discussion of the predecessor to Section 10743 in *Middle Atlantic* supports this analysis. The court observed that the provision "speaks only to the 'nonliability' in certain narrow situations of warehousemen, and others similarly situated, who appear as *consignees* on the bill of lading," and it emphasized that the law of agency operates only to exonerate agents for disclosed principals only with respect to acts "within the scope of the agency." Accordingly, if as NS proposes herein the Board assists carriers in collecting demurrage from intermediaries on a foundation other than the intermediary's designation as "consignee" in the bill of lading, Section 10743 should not be interpreted to allow such intermediaries to pass off liability on to other parties regardless of whether they may be acting as agents.

Finally, Section 10743 does not address at all the potential liability of the consignor, and, as such, a receiver's notification regarding its agency status will not affect the liability of the consignor for demurrage attributable to the receiver to which that consignor directed the carrier to deliver the freight car.

6. ***"If § 10743 is applicable, would the* Groves *analysis (finding that liability does not attach unless the receiver agrees to accept liability) apply to the underlying shipping rate as well as demurrage charges? If it did, how would such a ruling affect industry practice?***

Regardless of whether Section 10743 applies to demurrage, NS is concerned that *Groves* might be asserted to suggest that an intermediary's designation as "consignee" in the bill of lading does not by itself provide an adequate contractual basis for an action seeking to collect *any* applicable charges from the intermediary, not just demurrage

charges. When the *Groves* decision discusses the legal significance of an intermediary's designation as the "consignee" and suggests that there must be a "meeting of the minds" between the carrier and intermediary in order to establish contractual liability, it does not make any express distinction between liability for demurrage and liability for payment of freight charges.[52]

Were the holding in *Groves* extended to freight charges, however, NS does not believe such an extension would be as disruptive to NS's practices as its application to demurrage charges, because it is well established that the consignor remains responsible for unpaid freight charges. From time to time, NS encounters difficulty collecting freight charges from the party identified in the bill of lading, sometimes as consignee and sometimes as the "bill to" party, as responsible for payment. These difficulties are not limited to situations where shipments are delivered to intermediaries. NS's practice is to seek recovery of freight charges from the consignor, which remains responsible for payment of freight charges. NS believes that this practice in the context of freight charges provides further support for a Board policy statement confirming that it would be reasonable for NS similarly to seek collection of demurrage charges incurred by intermediaries from the shippers responsible for directing railcars to those receivers.

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[52] *See, Groves*, 586 F.3d at 1281 (discussing the legal significance of consignee designation not expressly limited to demurrage context).

7. ***"Because the warehouseman or other receiver can reap financial gain by taking on as many cars as possible (and sometimes holding them too long), or by serving as a storage facility when the ultimate receiver is not ready to accept a car, should liability be based on an unjust enrichment theory? The court rejected such an approach in Middle Atlantic, 353 F. Supp. at 1124, principally because it found no benefit to the warehouseman from holding rail cars. Is that finding valid?"***

As noted above (*see* pages 12-14), NS believes that intermediaries in many circumstances can benefit financially from using railroad-provided railcars in ways that are inefficient from the standpoint of the network as a whole. As the Board's question notes, they may "take on" more railcars than they can unload (given constraints of track space, personnel or otherwise) in order to avoid having those shipments diverted elsewhere by the shipper (or other party). Alternatively, they may prefer to use freight cars as a place to store commodities awaiting onward movement (by vessel or otherwise) rather than investing in additional warehouse space.

VERIFICATION

My name is Damon M. Deese. I am Manager of Revenue Accounting Customer Services. I declare under penalty of perjury that the facts set forth in Norfolk Southern's Opening Comments are true and correct to the best of my knowledge, belief, and information. Further, I certify that I am qualified and authorized to make this statement.

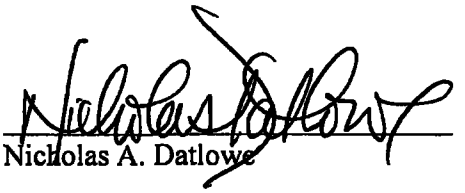
Executed this 7th day of March, 2011.

Damon M. Deese

Damon M. Deese

CERTIFICATE OF SERVICE

I, Nicholas A. Datlowe, certify that on this date a copy of the Opening Comments of Norfolk Southern Railway Company, filed on March 7, 2011, was served by email and by first-class mail, postage prepaid, on all parties of record.



Nicholas A. Datlowe

Dated: March 7, 2011

EXHIBIT A

TO
NORFOLK SOUTHERN'S OPENING COMMENTS IN EX PARTE NO. 707

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

NORFOLK SOUTHERN RAILWAY COMPANY	)	
v.	)	CIVIL ACTION NO. CV407 155
BRAMPTON ENTERPRISES, LLC d/b/a SAVANNAH RE-LOAD	)	

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant Brampton Enterprises, LLC d/b/a Savannah Re-Load (hereinafter "Savannah Re-Load") files this Motion for Partial Summary Judgment concerning the scope and manner in which it may be liable to the Plaintiff. Savannah Re-Load has already moved for summary judgment on the grounds that it cannot be considered the freight consignee, and therefore liable for demurrage, merely because another entity erroneously and unilaterally named Savannah Re-Load as consignee on the bills of lading. In addition, the Defendant moves for partial summary judgment on three grounds: (1) assuming it can be liable as a consignee merely because a bill of lading identifies it as such, then those bills of lading which do not properly identify Defendant cannot render it liable; (2) that Defendant is not subject to 49 U.S.C.A. § 10743(a) because it is not a "consignee that is an agent only;" and (3) that unloading freight for export does not, by itself, constitute "acceptance" of the freight as that term applies to consignees.

Statement of Facts

Defendant Savannah Re-Load is a warehouseman; it receives freight at its facility, unloads it from the container in which it arrives (in this case, rail cars), and then re-loads it for export through the Georgia Ports Authority. (Affidavit of Billy Groves, attached as Exhibit "A"). Savannah Re-Load does not purchase the freight it unloads, has no ownership interest in it, and is not a party to the transportation contract that results in the freight's shipment to its facility. (Groves Aff., p. 2-3). Instead, freight arrives at Savannah Re-Load's facility at the direction of a freight forwarder, Galaxy Forwarding, Inc. (*Id.*, p. 1). Galaxy Forwarding makes arrangements to transport freight for its customers; it elected to export the subject freight using Savannah Re-Load's services. (*Id.*).

Galaxy Forwarding is the only freight forwarding company that sent rail cars to Defendant's facility. (Groves Aff., p. 1). It was aware of Savannah Re-Load's operational capacity and made its own determination regarding the amount of freight to send to Savannah Re-Load. (Affidavit of Mark Sayers, Attached as Exhibit "B"). It arranged transportation for the subject freight shipments without consulting Savannah Re-Load in advance. (Groves Aff., p. 1).

When Galaxy Forwarding sent freight to Defendant's facility, it usually, but not always, sent an email informing Savannah Re-Load that the subject freight was enroute and giving the shipping instructions for its export.[1] (Groves Aff., p. 2). This notice gave no information regarding the actual consignee or beneficial owner. (*Id.*). Instead, it provided a "booking number" which Savannah Re-Load used to match the freight with

[1] In those instances where Savannah Re-load does not receive an email from Galaxy Shipping, it must unload the freight and use a shipping specification sheet which accompanies the freight to request the shipping instructions. (Groves Aff., p. 2).

the container ship which would export it.[2] (*Id.*). Once it knew the appropriate vessel, Savannah Re-Load could deliver the cargo to that ship. (*Id.*).

The Plaintiff has sued Savannah Re-Load for the demurrage which it claims accrued on the rail cars it delivered to Savannah Re-Load's facility between March and August, 2007. Plaintiff's lawsuit against Savannah Re-Load is premised upon a common law rule which holds that a consignee is liable for demurrage upon acceptance of the freight.[3] (Dkt. 30, p. 5). According to Norfolk Southern, Savannah Re-Load is named as the consignee in the relevant bills of lading, accepted delivery of the freight, and failed to return the rail cars within the "free time" provided by Norfolk Southern's demurrage tariff. (Dkt. 30, pp. 1-3). Plaintiff argues that these facts—even though Savannah Re-Load did not consent to or know of its consignee designation—bind Savannah Re-Load to the transportation contract and render it liable for demurrage.

Savannah Re-Load moved for summary judgment (Dkt. 25) on the grounds that it is not the consignee merely because another entity erroneously and unilaterally identified it as such. In other words, Savannah Re-Load argued that it is not the consignee merely because the bill of lading says so. The Plaintiff disagreed, relying upon the only case which has ever supported its position: *CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247, 251 n. 1 (3rd Cir. 2007). It argues this case permits it to collect demurrage from anyone listed as consignee on the bill of lading, irrespective of whether that entity is, in reality, the consignee. (Dkt., 30, pp. 6-7). It also argues that if Savannah Re-Load was not the actual consignee, then it was required to reject the

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[2] A sample of this shipping instruction was also attached as Exhibit "B" to Savannah Re-Load's Consolidated Reply Brief. (Dkt.42).

[3] The limits of the common law rule that a consignee becomes bound to the transportation contract upon acceptance of the shipment is examined more fully in Defendant's Brief supporting its Motion for Summary Judgment. (Dkt. 26).

freight or to "provide written notice of agency." (Dkt. 30, p. 10). Its failure to do so, Plaintiff argues, subjects it to liability.

After Savannah Re-Load moved for summary judgment, the Plaintiff produced approximately 3,800 pages of documentation, including the bills of lading which it claims entitle it to demurrage; some of these bills of lading prompt this Motion.

The bills of lading produced by the Plaintiff reveal that it seeks demurrage for numerous shipments which do not actually identify Savannah Re-Load or Brampton Enterprises, LLC; instead, many of them identify fictitious entities such as "Savannah Re-Load LLC" or "Savannah Reload."[4] Though these are obviously close approximations, neither is Defendant's name. Other bills of lading identify the consignee as the "Port of Savannah."[5] Savannah Re-Load therefore seeks a ruling that, in the event a bill of lading can unilaterally transform Savannah Re-Load into a consignee, then it must accurately and precisely identify the Defendant in order to do so.

Second, Plaintiff has argued that the fact Savannah Re-Load is not the actual consignee is irrelevant because a "named consignee" can avoid demurrage by refusing to accept the freight or giving the carrier timely written notice of agency. (Dkt. 30, p. 8). It goes on to state that "Savannah [Re-Load] never undertook the simple steps [of providing notice of agency] to avoid liability for the demurrage." (Dkt. 30, p. 10). However, Savannah Re-Load is not an agent of the consignee or of anyone else;

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[4] For example, see NS 1284-1285 and NS 1318-1319, respectively; Plaintiff attached these four documents to Mr. Young's affidavit. (Dkt. 46).

[5] For example, see NS 1237-1238; attached to Mr. Young's affidavit. (Dkt. 46). These bills of lading put Savannah Re-Load's name below the "Port of Savannah."

therefore it moves for summary judgment that it is not a "consignee that is an agent only" and therefore not subject to the statute giving rise to this requirement.

Finally, the concept of "acceptance" is important in this litigation. Pursuant to the common law rule that a consignee is liable for demurrage upon acceptance of the freight, the Plaintiff has argued that Savannah Re-Load is liable for demurrage because it is the named consignee and accepted the subject freight. (Dkt. 30, p. 3). Savannah Re-Load seeks a ruling that unloading freight for export according to instructions from a freight forwarding company is not acceptance of the freight.

A. Bills of lading which do not identify "Brampton Enterprises, LLC" or "Savannah Re-Load" as consignee cannot bind the Defendant to the transportation contract.

Assuming the fact that someone has unilaterally and erroneously identified Savannah Re-Load as the consignee—an act not disclosed to or consented to by the Defendant—is enough to bind it to the transportation contract, it stands to reason that the Defendant should only be liable for those bills of lading which do in fact identify it, and not some other entity, as the consignee. In other words, in order to bind the Defendant to the transportation contract, the Plaintiff should be able to rely upon only those bills of lading which correctly identify "Savannah Re-Load" or Brampton Enterprises, LLC" as the consignee.

"[I]t is well settled that the terms of the bills of lading are strictly construed against the carrier." *Crowley Liner Services, Inc. v. Transtainer Corp.*, 2007 WL 433352, 7 (S.D. Fla., 2007)(*citing The Caledonia*, 157 U.S. 124, 137 (1895)). This principle should apply here. Plaintiff seeks to use these erroneous bills to its advantage without respect

to whether Savannah Re-Load is actually the freight consignee. It should therefore be required to show that it—not a fictitious entity—is the named consignee in order to bind it to a transportation contract.

Some bills of lading identify the consignee as either "Savannah Re-Load LLC," "Savannah Reload," or "Port of Savannah" or some other imperfect variation of this Defendant's name.[6] However, Brampton Enterprises, LLC has never done business under any of those names. Though very close to its trade name, Savannah Re-Load, neither version is correct. Brampton Enterprises has registered its trade name as "Savannah Re-Load." (Groves Aff., p. 1). Therefore, alternative, incorrect appellations do not identify the Defendant, Brampton Enterprises, LLC.

Plaintiff may argue that these incorrect names are "close enough" and sufficiently identify the Defendant's trade name. However, this argument overlooks the fact that the Plaintiff seeks more than $70,000 in demurrage using one solitary hyper-technical basis: someone erroneously identified the Defendant as consignee without its knowledge or permission. Without this error, Plaintiff would have no argument it is entitled to demurrage from Savannah Re-Load. If it can recover in this manner, then the hyper-technical nature of this claim should cut both ways; it should not be permitted to recover where Defendant is not named as consignee, no matter how close the spelling may be. Therefore, Defendant seeks a ruling that, in order to bind it to the transportation contract, the bill of lading must correctly identify it.

[6] *See* notes 5 and 6, *supra*.

B. Savannah Re-Load is not a "consignee that is an agent only" because it is not a agent for any entity.

Norfolk Southern has consistently argued that the Third Circuit's holding in *Novolog, supra.* should apply here; that Savannah Re-Load is subject to demurrage even if it is not the actual consignee because, under 49 U.S.C.A. § 10743, there are two ways for a "named consignee" to avoid demurrage: "(1) refusing the freight and (2) by providing the carrier timely written notice of agency." (Dkt. 30,p. 8; *see also*, Dkt. 47, p. 2). Stated another way, Plaintiff tries to use 49 U.S.C.A. § 10743 to expand the common law to reach warehousemen who are not the consignee but may have been erroneously identified as such on the bill of lading. However, this rule does not apply to Savannah Re-load because it is limited to those instances where a consignee is an agent.[7]

In *Novolog*, the Third Circuit referred to 49 U.S.C.A. § 10743 as the "ICCTA's consignee-agent liability provision" and, held that it "adds precision to the common law, tradition [that a consignee is liable for demurrage] by clearly laying out what a named consignee/recipient must do to avoid liability on the grounds that it is an agent." *Novolog*, 502 F3d. at 255-256. The Third Circuit makes this logical leap upon the assumption that the defendant port was an agent; it did not purport to apply this statute to those situations where the recipient is not an agent for the freight's beneficial owner.[8]

The existence of an agency relationship is necessary because the statute only purports to apply to deliveries to "consignees who are agents only." 49 U.S.C.A. §

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[7] Savannah Re-Load has previously pointed out that it is not an agent for the freight's beneficial owner. (Dkt. 42, p. 10).

[8] The defendant in *Novolog* did not take the position that it was not an agent for the actual consignee; therefore this issue was not before the Third Circuit.

10743(a)(1). Here, however, Savannah Re-Load has not acted as anyone's agent. "The relation of principal and agent arises wherever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another in his behalf." O.C.G.A. § 10-6-1. "The distinguishing characteristic of an agent is that he is vested with authority, real or ostensible, to create obligations on behalf of his principal, bringing third parties into contractual relations with him." *Process Posters, Inc. v. Winn Dixie Stores, Inc.*, 263 Ga. App. 246, 250, 587 S.E.2d 211, 215 (2003). In other words, the relationship arises where the principal authorizes another to act for him. Here, Savannah Re-Load has no contact with the freight's beneficial owner; it is not even given the owner's name. (Groves Aff., p. 2). Neither the beneficial owner or any other entity has vested Savannah Re-Load with authority to create obligations on its behalf. (*Id.*). Savannah Re-Load's only function with respect to the subject freight was to unload it for export via container ship. Therefore, Savannah Re-Load is not a "consignee that is an agent only." Because it is not a "consignee that is an agent only," Savannah Re-Load seeks a ruling that 49 U.S.C.A. § 10743 is inapplicable.

C. Unloading freight, by itself, does not constitute acceptance of the shipment.

When it originally moved for summary judgment, Savannah Re-Load limited its argument to whether one was a consignee merely because an erroneous bill of lading said so. In opposing this Motion, Plaintiff stressed that the fact that Savannah Re-Load is not the actual consignee is "not determinative, only its role in accepting delivery of and freight as consignee is determinative of its liability to Norfolk Southern." (Dkt. 30, p. 7). It further emphasized the importance of acceptance by arguing that "Savannah [Re-

Load] is mistaken that the issue of 'acceptance of freight' is not an issue in a demurrage case. In order for a rail carrier to assess a consignee with demurrage, the consignee must accept delivery of the freight." (Dkt. 47, p. 2). "Savannah [Re-Load's] acceptance of delivery of the freight, and its failure to notify Norfolk Southern of its agent status, are the critical factors that leave Savannah [Re-Load] liable for demurrage." (*Id.*)(emphasis in original).

Plaintiff goes even further with this emphasis on acceptance by using it to distinguish the various cases which have held that one is not the consignee merely because a bill of lading incorrectly says so. For example, the Seventh Circuit has held that "being listed by third parties as a consignee on some bills of lading is not alone enough to make [defendant] a legal consignee liable for demurrage charges, although it, coupled with other factors, might be enough to render [defendant] a consignee." *Illinois Cent. R. Co. v. South Tec Development Warehouse, Inc.*, 337 F.3d 813, 821 (7th Cir. 2003). Plaintiff claims that one of the "other factors" contemplated by the Seventh Circuit is whether the consignee accepted the freight. (Dkt. 47, p. 3). Likewise, Plaintiff distinguished three cases unfavorable to its position by claiming that, unlike the defendants in those cases, Savannah Re-Load accepted the freight and therefore is liable.[9] (Dkt. 47, pp. 3-4). "Here, factors other than being listed solely as the consignee

[9] Plaintiff was distinguishing *Union Pacific railroad Co. v. Carry Transit*, No. 3:04-CV-1095 (N.D. Tex. Oct. 27, 2005); *CSX Transp., Inc. v. City of Pensacola, Fla.*, 936 F.Supp. 880 (N.D.Fla.,1995); and *Western Maryland Ry. Co. v. South African Marine Corp.*, 1987 WL 16153 (S.D. N.Y. 1987). In reality, each of those defendants received rail freight as part of their business operations, just as Savannah Re-Load did.

existed (acceptance of freight and failure to notify rail carrier or agent status) clearly result in Savannah being liable for demurrage." (Dkt. 47, p. 3).[10]

Plaintiff accentuates acceptance because it is the mechanism by which the consignee adopts, and becomes a party to, the transportation contract. As Plaintiff has stated, a "consignee becomes a party to the transportation contract, and is therefore bound by it, upon accepting the freight; thus it is subject to liability for transportation chargers even in the absence of a separate contractual agreement or relevant statutory provision." (Dkt. 30, p. 5, *citing Novolog*, 502 F.3d at 255). Defendant Savannah Re-Load does not dispute that it unloaded the freight delivered to its premises according to the instructions it received from Galaxy Forwarding. However, Savannah Re-Load submits that unloading freight for export according to instructions from a freight forwarding company does not constitute an "acceptance" of it.

There are legal ramifications associated with "accepting" freight which highlight the difference between accepting it and unloading it for export. This difference shows that Savannah Re-Load never accepted the freight it unloaded. For example, a consignee is expected to "examine the goods, to ascertain whether they answer the description ordered by him." *Reed Oil Co. v. Smith*, 154 Ga. 183, 186-187, 114 S.E. 56, 58 (1922). Savannah Re-Load never had or undertook this obligation. (Groves Aff., p. 3). In fact, it did not have the ability to examine the goods it unloaded because it had no way to determine whether they "answered the description ordered;" Savannah Re-Load was not a party to nor provided with the purchase agreement. (*Id.*).

[10] With respect to *South African Marine Corp.*, the Plaintiff referred to acceptance of the freight as "involvement on [Savannah Re-Load's] part" that made the instant case "much different." (Dkt. 47, p. 4).

In the context of sales, acceptance of the freight carries significant legal consequences for the consignee.[11] If he accepts the goods, then, under the Uniform Commercial Code, the consignee has "no subsequent right to reject for nonconformity." *Imex Intern., Inc. v. Wires EL*, 261 Ga. App. 329, 334, 583 S.E.2d 117, 122 (2003). "It is well settled that acceptance precludes rejection of the goods accepted." *Contract Sales & Service Intern., Inc. v. American Exp. Travel Related Services Co., Inc.*, 216 Ga. App. 61, 61, 453 S.E.2d 62, 63 (1994).

As set forth above, Savannah Re-Load is not an agent for the actual consignee or the beneficial owner, it therefore does not act on its behalf to inspect or accept the shipments. This lack of agency and the fact that it knows nothing about the purchase contract prevents Savannah Re-Load from inspecting the subject freight. Savannah Re-Load does not know what the actual consignee has ordered, what specifications the actual consignee requires, or how to determine whether the freight conforms in quantity, quality, fitness, or condition to what the actual consignee has ordered. (Groves Aff., p. 3). It also has no way of knowing whether the freight has been delivered in a timely manner. (*Id.*). Moreover, Savannah Re-Load exports the freight; there may be some event during the course of the freight's remaining journey which impacts the actual consignee's willingness to accept it. It would lead to an absurd result if the actual consignee could not reject non-conforming freight or freight which sustained damaged after it left Savannah simply because an entity with whom it has no relationship, Savannah Re-Load, "accepted" the freight.

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[11] Because it is not privy to the purchase or transportation contracts associated with subject freight, and because it is not given the name of the actual consignee, Savannah Re-Load does not know whether the freight at issue is governed by the Uniform Commercial Code. However, Plaintiff does not appear to limit its lawsuit to only those shipments which are not governed by the UCC.

These same principles apply outside of the UCC. Some circuits have recognized a general rule that "[i]n an action to recover from a carrier for damages to a shipment. . . under the [Interstate Commerce Act]. . . the consignee has a duty to accept them and mitigate damages unless the goods are deemed 'totally worthless.'" *Oak Hall Cap and Gown Co., Inc. v. Old Dominion Freight Line, Inc.*, 899 F.2d 291, 294 (4th Cir. 1990). This rule makes sense where the freight is delivered to the actual consignee or an agent of the actual consignee; such an entity can "accept" the goods and is in a position to mitigate damages. In contrast, Savannah Re-Load is not the actual consignee, an agent for the consignee, able to determine whether goods are "totally worthless" or in a position to mitigate the actual consignee's damages.

Finally, Savannah Re-Load does not realize any of the benefits of ownership that come with accepting good consigned to it. "The effect of a consignment of goods, generally, is to vest the property in the consignee. . . ." *Grove v. Brien*, 49 U.S. 429, 439, (1850). "[T]he consignee may be presumed to be the owner of the goods which have been accepted for shipment. . . ." *Saunders Bros. v. Payne*, 29 Ga. App. 615, 615-616, 116 S.E. 349, 350 (1923). However, Savannah Re-Load does not have any ownership interest in the freight it handles. This is evidence that it has not "accepted" the freight as the term applies to consignees, by unloading it for export. Therefore, Savannah Re-Load requests the Court rule that it has not accepted the freight for purposes of demurrage simply by unloading it for export.[12]

Conclusion

[12] In its consolidated response brief, Savannah Re-Load argued that there was no evidence that it accepted the freight at issue. (Dkt. 42, p. 12). It premised this position on the distinction between *unloading and accepting freight.*

For the foregoing reasons, Savannah Re-Load moves for summary judgment on the grounds that (1) even if unilateral and erroneous inclusion is sufficient, a bill of lading must accurately identify Savannah Re-Load in order to transform it into a consignee; (2) 49 U.S.C.A. 10743(a) is inapplicable because Savannah Re-Load is not an agent; and (3) Savannah Re-Load does not accept freight by virtue of unloading it for export.

This 30th day of May, 2008.

s/ Jason C. Pedigo
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

NORFOLK SOUTHERN RAILWAY COMPANY, Plaintiff, v. BRAMPTON ENTERPRISES, LLC d/b/a SAVANNAH RE-LOAD, Defendant.	)	CIVIL ACTION NO. CV407 155

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the within and foregoing document on all parties in accordance with the directives from the Court Notice of Electronic Filing ("NEF") which was generated as a result of electronic filing.

This 30th day of May, 2008.

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